No. 91-5771

In The

Supreme Court of the United States

October Term, 1991

HAROLD RAY WADE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY BRIEF

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The government argued before the Court of Appeals that the District Court had no power whatsoever to inquire into the reasons behind the prosecutor's refusal to make a substantial assistance motion.[1] The government took the same position in its Brief in Opposition to the Petition for Certiorari,[2] and in briefs opposing certiorari in at least five other cases presenting the same issue.[3] Yet in a remarkable about-face that is tantamount to a confession of error, the government now concedes (Resp. Br. 8, 23-27) that the prosecutor's decision not to file a substantial assistance motion *is* subject to judicial review, just as petitioner contends, when the prosecutor's conduct is alleged to violate the Constitution.

Having thus conceded away the central issue in this case, the government is now reduced to quarreling about

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[1] *See, e.g.*, Brief for the United States in *United States v. Wade* (4th Cir. No. 90-5805), at 6-10 ("There is no basis . . . for defendant's argument that the sentencing court may order the government to justify its decision to forego making a [substantial assistance] motion.").

[2] *See, e.g.*, Cert. Opp. at 6 ("[T]he government's decision not to file a 'substantial assistance' motion is not subject to judicial review.").

[3] *See, e.g.*, Briefs for the United States in Opposition to Petitions for Certiorari in *Huerta v. United States* (No. 89-5689); *Francois v. United States* (No. 89-6720); *Rexach v. United States* (No. 90-5212); *Sutton v. United States* (No. 90-5952); and *Chotas v. United States* (No. 90-6727).

the specific grounds on which the prosecutor's substantial assistance decision may be reviewed.[4] To camouflage this full-scale retreat, the government resorts to such disingenuous devices as distorting petitioner's position on the grounds for review and making inflammatory references to the "red herring" of obstruction of justice. Petitioner is confident that this Court will not allow these diversionary tactics to obscure the real issues in this case.

I. The Prosecutor's Substantial Assistance Decision Must Be Reviewable For "Bad Faith" Or "Arbitrariness."

The government now concedes (Resp. Br. 23-24) that the prosecutor's substantial assistance decision is subject to challenge on two of the three grounds described by petitioner: that it is deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, and that it is intended to punish the defendant for exercising a protected statutory or constitutional right. The government objects, however, to petitioner's third ground for review: that the prosecutor's decision is

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[4] The structure of the government's brief vividly illustrates the magnitude of its retreat. The government spends 15 pages of its 22-page argument discussing issues on which there is no disagreement: (i) that § 3553(e) makes a government motion a prerequisite to a downward departure for substantial assistance (Resp. Br. 10-12); (ii) that the decision whether to file a substantial assistance motion is committed by statute to the prosecutor's discretion (Resp. Br. 12-22); and (iii) that the prosecutor's decision not to make a substantial assistance motion is subject to judicial review when it is alleged to violate the Constitution (Resp. Br. 23-24).

the result of bad faith or arbitrariness sufficient to constitute a due process violation. The government contends that allowing review for "bad faith" or "arbitrariness" will "introduce a regime of extensive judicial review through the back door," by forcing the prosecutor to justify his substantial assistance decision whenever the defendant can show that he has been treated differently than other similarly situated defendants. (Resp. Br. at 8-9, 25-26).

The government's parade of horribles is based on a serious misrepresentation of petitioner's position. Contrary to the government's assertion (Resp. Br. 25-26), petitioner has never maintained that the sort of "bad faith" or "artibrariness" which the Due Process Clause forbids means "simply the treatment of one defendant differently from others similarly situated." Indeed, as the government acknowledges (Resp. Br. 25), petitioner's brief does not define either of these terms. The government nonetheless uses this definition to assert that permitting review for "bad faith" or "arbitrariness" will force the prosecutor to justify his failure to make a substantial assistance motion whenever the defendant can show that the prosecutor has made such motions for other similarly situated defendants (Resp. Br. 8-9, 25-26).

The government's argument is disingenuous at best. Petitioner has never endorsed the government's rather unusual definition of "in bad faith" or "arbitrary," and he does not do so now.[5] To the contrary, petitioner uses

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[5] The government's definition is apparently drawn from *United States v. Smith*, 953 F.2d 1060 (7th Cir. 1992), a decision that petitioner has neither cited nor endorsed.

these terms as they have always been used in this Court's due process jurisprudence: to mean based on factors that are not rationally related to any legitimate state objective – *e.g.*, a personal grudge against the defendant, a desire to advance the prosecutor's own political career, or the outcome of a coin toss. The government's assertion (Resp. Br. 25) that this Court has never allowed an exercise of prosecutorial discretion to be challenged on such grounds is flatly incorrect: a long line of this Court's decisions establish that the federal courts may enjoin a state prosecutor's "bad faith" decision to initiate criminal charges. *See, e.g., Moore v. Sims,* 442 U.S. 415, 432 (1979); *Perez v. Ledesma,* 401 U.S. 82, 85 (1971); *Younger v. Harris,* 401 U.S. 37, 47-54 (1971); *Dombrowski v. Pfister,* 380 U.S. 479 (1965).[6] If a showing of prosecutorial bad faith will permit a federal court to interfere with prosecutorial discretion in this most drastic manner, it will surely permit a federal court to take the infinitely less intrusive step of requiring the prosecutor in a federal criminal proceeding pending before it to explain why he has failed to move for leniency. Fidelity to the constitutional guarantee of due process requires that the prosecutor's substantial assistance decisions be subject to challenge on this basis. *Cf. Chapman v. United States,* ___ U.S. ___, 111 S.Ct. 1919, 1927 (1991) (basing sentencing decisions on "arbitrary" factors is a violation of the defendant's due process rights).

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[6] *See also Shaw v. Garrison,* 467 F.2d 113 (5th Cir.), *cert. denied,* 409 U.S. 1024 (1972) (enjoining prosecution brought for the purpose of advancing the prosecutor's own financial interests); *Pizzolato v. Perez,* 524 F.Supp. 914 (E.D. La. 1981) (enjoining prosecution brought to coerce defendant into dropping his pending libel action against the prosecutor).

Allowing defendants to challenge the prosecutor's substantial assistance decision for "bad faith" or "arbitrariness" will not, as the government asserts (Resp. Br. 26), mean that prosecutors will have to justify virtually every decision not to file such a motion. For years, the federal courts have prevented claims of discriminatory or vindictive prosecution from being too readily asserted by requiring a defendant to make a strong prima facie showing of unconstitutional behavior in order to earn even the right to an evidentiary hearing on such a claim. *See* 2 W. LaFave & J. Israel, *Criminal Procedure* §§ 13.4 & 13.5 (1984). The number of "bad faith" or "arbitrariness" challenges to the prosecutor's substantial assistance decision can be kept within reasonable bounds in the same fashion. Indeed, these procedural hurdles should prove even more effective in this context, because it is generally more difficult to prove unconstitutional "arbitrariness" than to prove discriminatory or vindictive animus. A strong presumption of good faith behavior and a stiff prima facie case requirement, rather than a total ban on review, is the way to discourage frivolous claims of "bad faith" or "arbitrary" prosecutorial behavior without sacrificing defendants' constitutional rights.

II. 18 U.S.C. § 3553(e) Does Not Abrogate The District Court's Inherent Power To Ensure That The Prosecutor Exercise His Substantial Assistance Discretion Within Constitutional Limits.

Contrary to the government's suggestion (Resp. Br. 21-22), 18 U.S.C. § 3553(e) does not abrogate the District Court's inherent power to demand that the prosecutor

exercise his substantial assistance discretion within constitutional limits. It is of course true that Congress may limit the inherent supervisory power of the lower federal courts by statute or rule. *See Chambers v. NASCO, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 2134 (1991); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). But 18 U.S.C. § 3553(e) does not expressly forbid the federal courts to exercise their inherent supervisory power in this fashion, and this Court has always been reluctant to infer Congressional intent to limit that power from ambiguous statutory language. *See Chambers*, ___ U.S. at ___, 111 S.Ct. at 2134 ("we do not lightly assume that Congress has intended to [limit] . . . the scope of a court's inherent power"). This Court should be even more reluctant to infer such a limitation where, as here, the limitation suggested would raise serious constitutional problems. *See* Pet. Brief at 18-23.

III. Petitioner Is Entitled To A Remand.

The government argues that even if petitioner is correct on the reviewability question, he is not entitled to a remand because he failed to make the threshold showing necessary to obtain a full evidentiary hearing on his claim of prosecutorial misconduct. (Resp. Br. 28) (asserting that petitioner was required to "produc[e] evidence, not merely allegations, to support his claim that the prosecutor's motives were improper").[7] This argument is wholly

[7] The government's suggestion that petitioner "has not even alleged a constitutional violation" (Resp. Br. 9) is utterly

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without merit. Petitioner did not make the requisite threshold showing because the District Court did not allow him to do so. After deciding that it had no authority to entertain petitioner's challenge to the prosecutor's substantial assistance decision, the District Court refused to allow petitioner's counsel to put forth any evidence supporting that challenge (J.A. 9-10).[8] The Fourth Circuit

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without merit. Petitioner has maintained throughout this litigation that the prosecutor acted "arbitrarily" and "in bad faith" in refusing to make a substantial assistance motion. *See* J.A. 24 (petitioner "sought unsuccessfully to inquire of the government why it refused to make the motion," in order "to resolve whether the government acted arbitrarily or in bad faith"). Such "bad faith" or "arbitrariness" is the very essence of a due process violation. The fact that petitioner has not always mentioned the Due Process Clause in the same breath as these terms is of no moment; this Court has never held that a party must cite chapter and verse in making a constitutional claim, so long as the basis of that claim is clear. *Cf. Picard v. Conner*, 404 U.S. 270, 278 (1971).

[8] Though the Court allowed petitioner to "state for the record . . . what the evidence would be," (J.A. 10), it did not allow him actually to put on evidence, nor did it allow him to explain the basis for his challenge to the prosecutor's decision. When petitioner's counsel asked the Court whether it would "be appropriate for me to put on evidence at this point, or are you ruling basically on my grounds for making this [request]," the Court responded, "I'm ruling on your grounds." *Id.* When petitioner's counsel complained that he was "being cut off before I get to that point," the Court agreed: "That's what I'm saying. You may appeal on my ruling." *Id.*

The fact that petitioner's counsel used his limited proffer to explain the assistance petitioner had provided does not mean that his "objection to the government's refusal to file a

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affirmed on the ground that District Court had no authority to inquire into the reasons for the prosecutor's decision (J.A. 26-28). If this Court reverses the Fourth Circuit on that point, it must remand the case to give petitioner a chance to make the threshold showing necessary to obtain an evidentiary hearing on his claim, a chance the lower courts denied him. To hold that the Fourth Circuit's error on the reviewability question was "harmless" because petitioner did not make a threshold evidentiary showing he was never given an opportunity to make would be manifestly unfair.

The government's argument that petitioner is not entitled to a remand because his alleged obstruction of justice was "a wholly legitimate reason for the prosecutor's decision not to file a substantial assistance motion" (Resp. Br. 31) is similarly without merit. Because the District Court did not allow petitioner to inquire into the reasons for the prosecutor's decision not to make the motion, it is impossible to determine whether the alleged obstruction of justice was in fact the real reason for that decision. The government's reference to the alleged obstruction of justice is nothing more than a transparent resort to the age-old strategy of arguing inflammatory facts when the law is not on one's side.

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substantial assistance motion rested solely on his disagreement with the prosecutor about the value of his cooperation." (Resp. Br. 30). A showing that substantial assistance was in fact rendered is obviously an essential element of any claim that the prosecutor has refused to make a substantial assistance motion for an unconstitutional reason.

CONCLUSION

For the reasons given above, together with those set forth in Petitioner's initial brief, the judgment of the Court of Appeals should be reversed, and the case remanded for further consideration of petitioner's claim.

Respectfully submitted,

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